80-1114

No._____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GLASSBORO SERVICE ASSOCIATION, INC.,

Petitioner,

vs.

RAYMOND MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. For purposes of computing the minimum wage, does the Fair Labor Standards Act permit farmers to consider as wages paid, their costs in providing migrant workers "board, lodging and other facilities?"

2. In that regard, has the Secretary of Labor emasculated the Legislative intent of Congress by enacting regulations that contradict the actual wording of the Act itself?

3. Does a contract entered into between a farmers' association, on behalf of the farmers, and the Commonwealth of Puerto Rico, on behalf of migrant workers, constitute a "bona fide collective bargaining agreement", as that term is used in Section 3(m) of the Fair Labor Standards Act?

4. For the purposes of construing the Fair Labor Standards Act, when a farmer loans a migrant worker transportation money, is the money loaned for the benefit of the farmer or for the benefit of the worker?

5. Should any or all of the above issues have been decided through the mechanism of Summary Judgment, as was done by the District Court and affirmed by the United States Court of Appeals for the Third Circuit?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. ———

GLASSBORO SERVICE ASSOC., INC.,

Petitioner,

vs.

RAYMOND MARSHALL, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, The Chief Justice and Associates Justices of the Supreme Court of the United States.

Glassboro Service Association, Inc.,* the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Third Circuit Court of Appeals entered in the above-entitled case on October 8th, 1980.

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* Glassboro Service Association, Inc. is a wholly owned subsidiary of the New Jersey Farm Bureau, a non-profit New Jersey Corporation.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix A, *infra*, at page A-1. The judgment of the Third Circuit Court of Appeals is also printed in Appendix A, *infra*, at page A-1. The Journal Entry of Judgment of the United States District Court for the District of New Jersey is printed in Appendix A hereto, *infra*, at page A2.

JURISDICTION

The judgment of the Third Circuit Court of Appeals (Appendix A, *infra*, page A-1), exercising jurisdiction pursuant to 28 U.S.C. Sec. 1292(a)(1), was entered on October 8th, 1980. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

This case concerns the construction of certain provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C., *et seq*. The exact sections of that Act which are involved here are as follows:

> A. Sec. 3(m) [29 U.S.C. 203(m)]. Wage paid to any employee includes the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities, are customarily furnished by such employer to his employees: Provided, that the cost of board, lodging or other facilities shall not be included as a part of the wage paid to any employee to the extent it is

excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee.

B. Sec. 6(a)(5) [29 U.S.C. 206(a)(5)]. Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

. . . .

(5) if such employee is employed in agriculture, not less than—(a) $1.60 an hour during the period ending December 31, 1974. (b) $1.80 an hour during the year beginning January 1, 1975. (c) $2 an hour during the year beginning January 1, 1976. (d) $2.20 an hour during the year beginning January 1, 1977, and (e) $2.30 an hour after December 31, 1977.

C. Sec. 15(a)(2) [29 U.S.C. 215(a)(2)]. After the expiration of one hundred and twenty days from the date of enactment of this Act [enacted June 25, 1938], it shall be unlawful for any person—

. . . .

(2) to violate any of the provisions of section 6 or section 7 [29 U.S.C. Sec. 206 or 207], or any of the provisions of any regulation or order of the Administrator issued under section 14 [29 U.S.C. Sec. 214];

The Department of Labor's Regulations and Interpretations of these sections of the Fair Labor Standards Act provide in pertinent part:

Title 29, Section 531.3: GENERAL DETERMINATIONS OF "REASONABLE COST."

(a) The term "reasonable cost" as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) "Reasonable cost" does not include a profit to the employer or to any affiliated person.

(c) Except whenever any determination made under Sec. 531.4 is applicable, the "reasonable cost" to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5½ percent) for interest on the depreciated amount of capital invested by the employer; *Provided,* That if the total so computed is more than the fair rental value (of the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term "good accounting practices" does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term "depreciation" includes obsolescence.

(d)(1) The cost of furnishing "facilities" found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized

as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

Title 29, Section 531.6: EFFECTS COLLECTIVE BARGAINING AGREEMENTS.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be "bona fide" when it is made with a labor organization which has been certified pursuant to the provision of section 7(b)(1) or 7(b)(2) of the Act by the National Labor Relations Board, or which is the certified representative of the employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended.

(c) Collective bargaining agreements made with representatives who have not been so certified will be ruled on individually upon submission to the Administrator.

Title 29, Section 531.32: "OTHER FACILITIES".

(a) "Other facilities," as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensation under the Act and the transportation is not an incident of and necessity to the employment.

(b) Shares of capital stock in an employer company, representing only a contingent proprietary right to participate in profits and losses or in the assets of the company at some future dissolution date, do not appear to be "facilities" within the meaning of the section.

(c) It should also be noted that under §531.3(d)(1), the cost of furnishing "facilities" which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items in addition to those set forth in §531.3 which have been held to be primarily for the benefit or convenience of the employer and are not therefore to be considered "facilities" within the meaning of section 3(m) in-

clude: Safety caps, explosives, and miners' lamps (in the mining industry); electric power (used for commercial production in the interest of the employer); company police and guard protection; taxes and insurance on the employer's buildings which are not used for lodgings furnished to the employee; "dues" to chambers of commerce and other organizations used, for example to repay subsidies given to the employer to locate his factory in a particular community; transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad); charges for rental of uniforms where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workmen's compensation acts, or similar Federal, State, or local law. On the other hand, meals are always regarded as primarily for the benefit and convenience of the employee. For a discussion of reimbursement for expenses, such as "supper money," "travel expenses," etc., see §778.217 of this chapter.

STATEMENT

Jurisdiction of the Federal District Court was based upon Section 17 of the Fair Labor Standards Act, 29 U.S.C. Sec. 217. Petitioner does not contest the jurisdiction of the Federal Courts to hear this matter.

Glassboro Service Association, the petitioner, is a New Jersey corporation that operates its business from Glassboro, New Jersey. Its members consist of 299 member farmers from throughout the eastern and southeastern

states. Glassboro provides a pool of farmworkers to harvest crops for its members. Most of the workers are recruited in Puerto Rico. Once they arrive in New Jersey, they are assigned to farms as the farmers need labor.

Each year a contract containing terms of employment is signed by Garden State Service Association, a Glassboro agent, and each worker who agrees to work for Glassboro. The contractual terms must be reviewed and approved by the Secretary of Labor of the Commonwealth of Puerto Rico before a contract can be offered to prospective workers. Most of the terms of the contract are mandated in advance by Puerto Rican law and regulations.

During 1975, 1976, and 1977, the years in question, the contracts that were in effect provided that the worker was responsible to pay the cost of airfare from Puerto Rico to the mainland. If the worker could not afford the airface, however, Glassboro could advance the money. The money was to be repaid by the worker on a weekly basis according to a schedule stipulated in the contract.

It is the contractual repayment schedule to which the Department of Labor objected. That section of the contract provides that the worker shall repay any transportation money he has borrowed in stipulated weekly installments as follows:

ARTICLE IX—TRANSPORTATION

> E. In the event the employer advances any or all of that part of the transportation costs for which the Worker is responsible or makes any other advance to the Worker, the Worker agrees to repay such indebtedness in weekly installments in the following manner: Five Dollars ($5.00) from the first Twenty-Five Dollars ($25.00) earned in such week and an addi-

tional Two Dollars ($2.00) from each additional Five Dollars ($5.00) in such week.[1]

For the year 1975, the Fair Labor Standards Act required that agricultural workers be paid a minimum wage of $1.80 per hour; in 1976, $2.00 per hour; in 1977, $2.20 per hour. 29 U.S.C. Sec. 206(a)(5). Contracts between Glassboro and the workers provided for a payment of wages at the prevailing rate *or* $2.30 an hour, whichever was greater, in 1975; $2.40 per hour *or* the prevailing rate, whichever was greater, in 1976; and for $2.55 *or* the prevailing rate, whichever was greater, in 1977. Nursery Workers were compensated at $.05 per hour more in each year: $2.35 in 1975; $2.45 in 1976; and $2.60 in 1977. Compensation for piecework varied according to crop and worker efficiency; never, however, could payment for piecework be below the prevailing hourly contractual minimums.

At worst, then, workers who signed contracts with Glassboro earned $.50 per hour more than the minimum wage in 1975; $.40 more in 1976; and $.35 more in 1977. Nevertheless, application of the transportation loan repayment schedule sometimes resulted in workers' receiving paychecks for less than minimum wage for the first few weeks of their stay. The Department of Labor contends that this practice violates the minimum wage provisions of the Fair Labor Standards Act. Petitioner disagrees with this analysis on several grounds.

First of all, the Glassboro Service Association, and its member-farmers, provide workers with free lodging, laun-

1. This clause has been in the Glassboro contract with the Commonwealth of Puerto Rico for over thirty years. The Department of Labor maintains, nevertheless, that adherence to this schedule has resulted in violations of Sections Six and Fifteen (a)(2) of the Fair Labor Standards Act, the provisions that pertain to minimum wage, for the years 1975 through 1977.

dry facilities, utilities and associated items. The farmers are required to furnish these items by the contracts signed each year between the Commonwealth of Puerto Rico and Glassboro's agent, Garden State Service Association. Each migrant worker is also supplied by those for whom he works with meals at a cost to the worker of $3.50 *per day*, far below actual cost, or with kitchen facilities free of charge.

Normally, the Glassboro Service Association, and the farmers who belong to it, would be allowed a credit in the computation of the minimum wage for the cost of providing lodging, board and like amenities to the workers. The Fair Labor Standards Act states this with clarity:

> *Wage paid* to any employee *includes* the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with lodging or other facilities, are customarily furnished by such employer to his employees . . .

The regulations promulgated to interpret Section 3(m), moreover, make it clear that credit is to be given to the employer for his "reasonable costs" of furnishing any employee with board, lodging, or other facilities that are customarily furnished by the employer to his employee. 29 C.F.R. Sec. 531.2(a).

Glassboro and its member-farmers can provide expert testimony to the effect that it cost Glassboro's average farmer-member 31½ ¢ per hour in 1975 and 41½ ¢ per hour in 1976 to provide the housing facilities to the workers. These costs, if established, would entitle Glassboro and its member-farmers to a substantial set-off against what is required to be paid as minimum wage.

The District Court refused to allow such a set-off. To justify the disallowance, the Court relied on the phrase in Section 3(m) that provides as follows:

> The cost of the board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee.

Petitioner presented evidence showing that the contract between Glassboro and the Commonwealth was not a collective-bargaining agreement at all, let alone a "bona fide" collective-bargaining agreement. The Court's response was that it was enough that the contract in question was the "functional equivalent" of a collective bargaining agreement. In the Court's opinion, that was all that needed to be shown to satisfy the "bona fide collective-bargaining agreement" exclusionary language requirement of the Act.

As previously noted, the Fair Labor Standards Act allows "facilities" that are customarily furnished by an employer to his employee to be included as "wages paid". See Section 3(m), *infra*. It is undisputed that the cost to a farmer of advancing transportation to a worker qualifies as an "other facilit[y]" for the purposes of Section 3(m). The Department of Labor in its brief to the Third Circuit Court of Appeals admitted that "the FLSA allows the employer in certain instances to pay the employee wages, not only in cash but also in the form of facilities." [2]

The Department of Labor has adopted regulations interpreting Section 3(m). These regulations state that

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2. Page 13, Brief of Secretary of Labor in the United States Court of Appeals for the Third Circuit.

where the Wage and Hour Administrator finds that the "facilities" are "primarily for the benefit or convenience of the employer," the cost of furnishing them "would not be recognized as reasonable and may not therefore be included in computing wages." 29 C.F.R. 531.3(d). In yet another regulation, the Administrator has ruled that transportation charges are considered to be primarily for the employer's benefit "where such transportation is an incident of and necessary to the employment . . ." 29 C.F.R. Sec. 531.32(c).

Despite Glassboro's assertions that, in this instance, the transportation advanced was primarily for the benefit of the workers, the District Court granted summary judgment on the issue without giving Glassboro the opportunity to present its proofs at trial.

REASONS FOR GRANTING THIS WRIT

Point I

The Secretary of Labor has emasculated the legislative intent of Congress when it enacted the Fair Labor Standards Act by promulgating regulations that contradict the actual wording of the Act.

In at least two (2) instances, the Secretary of Labor has enacted regulations that are clearly contrary to the actual wording of the Fair Labor Standards Act. Therefore, it is necessary for the United States Supreme Court to step in and strike down this bureaucratic overreaching.

Section 3(m) of the Fair Labor Standards Act states very clearly that an employer shall receive a credit against the minimum wage when he furnishes an employee with board, lodging, or other facilities. The one and only exception to the right of an employer to take this credit is when "it is excluded therefrom under the terms of a *bona fide collective-bargaining agreement* applicable to the particular employee." The Secretary has adopted Section 531.6 in the Code of Federal Regulations to interpret the above language of the F.L.S.A. Section 531.6 reads as follows:

> (a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.
>
> (b) A collective-bargaining agreement shall be deemed to be "bona fide" when it is made with a labor organization which has been certified pursuant to the provision of section 7(b)(1) or 7(b)(2) of the Act by the National Labor Relations Board, or which is

> the certified representative of the employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended.
>
> (c) Collective bargaining agreements made with representatives who have not been so certified will be ruled individually upon submission to the Administrator.

As can be seen, the Secretary defines the term "bona fide" in Section 531.6(b). A collective-bargaining agreement is "bona fide" according to the Secretary, when it is made with a labor organization which has been certified by the National Labor Relations Board or under either the National Labor Relations Act or Railway Labor Act. Glassboro agrees with this definition of the term "bona fide."

The Secretary has totally abused his discretion, however, in adopting Section 531.6(c). That section states simply that "collective-bargaining agreements made with representatives who have not been so certified will be ruled on individually upon submission to the Administrator." In promulgating such a vague and nebulous regulation, the Secretary has emasculated the wording of the Act, which clearly requires that a *bona fide* collective bargaining agreement must have been negotiated before an employer will lose his right to a credit for providing "board, lodging, or other facilities" to his employees. Regulation 531.6(c) reads the word "bona fide" completely out of the Act!

To call the Glassboro Contract a bona fide collective bargaining agreement stretches the language and intent of the Fair Labor Standards Act past its breaking point. The term "bona fide", as used in Section 3(m) means "genuine" or "actual." Congress clearly intended, when it wrote Section 3(m), that employers should not be deprived of their

statutory credit for the costs of providing board, lodging, and other facilities unless that right was freely and knowingly bargained away in an *actual*, genuine collective bargaining agreement. *Marshall v. Hawaiian Telephone Company*, 575 F.2d 763 (C.A. 9, 1978); *Brennan v. Taft Broadcasting Company*, 500 F.2d 212 (C.A. 5, 1974).

Point II

The Trial Judge's reliance on the vague wording of Regulation 531.6(c), instead of on the words of the Fair Labor Standards Act itself, was error.

Regulation 531.6(c) reads the word "bona fide" completely out of the Fair Labor Standards Act. Moreover, even if 531.6(c) is a valid regulation—which is not conceded here—, the interpretation and weight given it by the Trial Judge is in error.

29 C.F.R. Sec. 531.6(c) speaks in terms of "collective-bargaining agreements" that are made with "representatives." But the Glassboro Contract is not the result of a collective-bargaining agreement at all, bona fide or otherwise. The role of the Commonwealth of Puerto Rico in the proceedings is either to accept or reject offers of terms made by an employer; it does not make offers itself, nor does it negotiate. What the Secretary does is set forth standards that must be met by any prospective employer before that employer can try to negotiate with workers, either on an individual or a collective basis. Moreover, the Commonwealth is *not* a signatory to the Contract. In a collective-bargaining situation, on the other hand, the bargaining agent signs for all.

Perhaps the clearest indication of all that the Secretary does not engage in collective-bargaining, and that the

end result of contracts monitored by the Secretary are not collective-bargaining agreements, are the provisions of the Secretary's Regulations themselves. The Regulations to Administrative Act No. 87 provide a very clear distinction between contracts executed between employers and organizations certified by the National Labor Relations Board, as opposed to those contracts, such as the one in which Glassboro is involved, that are merely approved by the Secretary. Section 6(f) of those Regulations states as follows:

> Contracts executed between employers and labor organizations certified by the National Labor Relations Board or the Puerto Rico Relations Board as to the collective bargaining representatives for any group of workers, or with any labor organization, recognized by any employer as such representative and which has been ratified by the workers, *shall automatically be approved by the Secretary.*

Ironically, then, if the Glassboro Contract really were the product of collective bargaining, it would have been automatically approved by the Secretary. Therefore, the fact that the Secretary monitored the provisions of the Glassboro Contract proves that the Contract is *not* the product of collective-bargaining, rather than the converse.

In this case, the granting of Summary Judgment has resulted in great injustice. Was the Contract in question a "bona fide collective-bargaining agreement?" No one has heard the testimony from the Commonwealth of Puerto Rico. No one has heard the testimony from Glassboro. Nobody has heard the migrants. No one has heard the farmers. If the regulation relied on by Judge Gerry is so "open-ended," how can the facts of the case be unimpor-

tant in reaching a determination of its meaning—especially when no Court has ever before interpreted that subsection of the regulation?

Point III

The precipitous Summary Judgment granted by the District Court has resulted in the poorer migrant workers not being able to afford to come to the Mainland to work, inasmuch as the farmers are no longer allowed to advance transportation costs.

There is a genuine issue of material fact as to whether the money loaned for transportation in the years 1975 to 1977 was for the benefit of the farmers or for the benefit of the workers. The Master contract for those years makes clear that workers were at liberty to pay for their own transportation tickets; indeed, the cost of the transportation was their responsibility (Article IX-A). In the event the employer did advance a worker any part of the transportation costs to get from Puerto Rico to the farm, however, or in the event the employer made any other advance to a worker, the worker, by contract, agreed to repay the loan in weekly installments. The installments were to be repaid in the following manner:

> Five Dollars ($5.00) from the first Twenty-Five Dollars ($25.00), earned in such week, and an additional Two Dollars ($2.00) from each additional Five Dollars ($5.00) in such week [Article IX-E].

As to whether transportation money loaned to the workers was for the benefit of the workers themselves or for the benefit of the farmers, the facts support a reasonable inference that workers are the ones primarily benefited.

Since 1978, when this suit was instituted, the Puerto Rican Government has *not* required Glassboro to advance transportation to incoming workers. Therefore, the workers have had to pay their plane fares themselves. Despite the fact that the workers themselves have had to advance the money for plane fares since 1978, however, Glassboro has been able to obtain a sufficient number of workers to fulfill the needs of their farmers.

Ironically, it is the Commonwealth of Puerto Rico that is complaining bitterly. Because the transportation loans have ceased, the workers on the island who are the most poor are now not able to afford to come! Thus, the workers have been hurt severely by the cessation of the transportation loans. The farmers, on the other hand, have actually gained from not being required to advance transportation money. From 1948 through 1977, contracts that Glassboro entered into required the association to advance transportation to the workers. During this time, Glassboro lost the incredible sum of $545,717.08. The money was lost because a great number of workers who were loaned funds for transportation left the farms before the cost of the transportation was recovered. It would appear, therefore, that advancing money to workers for transportation was a burden to the farmers, rather than a benefit.

It should also be noted that the personnel of the Commonwealth of Puerto Rico are ready and willing to testify at trial, that, in their opinion, the transportation loans should be construed to be for the benefit of the Puerto Rican workers. The Commonwealth representatives will testify that, unless these loans are provided, poorer farmworkers cannot afford the plane fares to the mainland. Commonwealth representatives even went to the U.S. Department of Labor recently to protest the U.S. Department of Labor's interpretation of the Fair Labor Standards Act

in regard to transportation advances. That interpretation, it was felt, is working a hardship on Puerto Rican workers and is detrimental to their interests.

All of the above information should definitely be heard by the trial Judge before a determination is made as to whether the transportation money advanced should be considered to be for the employer's benefit or for the worker's benefit. Judge Gerry felt that the whole issue was a legal question. But isn't it really a factual one? Testimony should be taken, particularly that of the Commonwealth of Puerto Rico representatives. After all, the Commonwealth of Puerto Rico, a sovereign in its own right, has been placed in the position of having parts of the contract it has so closely monitored: (a) being struck down for fostering Fair Labor Standards Act violations; (b) by a Federal District Court Judge from New Jersey; (c) without even having the opportunity to be heard; and (d) with the end result being extremely detrimental to its workers.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: December , 1980.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD DISTRICT

No. 80-1318

RAY MARSHALL, Secretary of Labor,
United States Department of Labor

vs.

GLASSBORO SERVICE ASSOCIATION, INC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D. C. CIVIL No. 78-0377)

Argued: October 7, 1980

Before: SEITZ, *Chief Judge*, HIGGINBOTHAM, *Circuit Judge*, and SCHWARTZ, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Seitz
Chief Judge

ATTEST:
/s/ Sally Mrvos
Clerk

Dated: October 8, 1980

* Murray M. Schwartz, United States District Court for the District of Delaware, sitting by designation.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT
(Filed December 5, 1979)

Plaintiff having moved for summary judgment on July 6, 1979, and defendant having opposed this motion, and a hearing having been held on this motion before the Court on October 19, 1979, partial summary judgment is hereby granted to plaintiff on the issue of liability, and it is therefore:

ORDERED, ADJUDGED AND DECREED that defendant, its member farmers, its agents, servants, employees and those persons in active concert or participation with it be and they hereby are permanently enjoined and restrained from violating the provisions of sections 6 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060; 29 U.S.C. §219), hereinafter called the Act, in any of the following manners:

(1) Defendant shall not contrary to section 6 of the Act fail to pay its employees who are engaged in commerce or in the production of goods for commerce, or who are employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act as aforesaid, at rates less than the minimum wage prescribed therein.

(2) Defendant shall not deduct the cost of transporting workers from the point of recruitment to the point of hire from the minimum wages due its employees under the Act. Defendant shall not include in the computations of its employees' minimum wages, as the cost of furnishing facilities to its employees, the cost of transporting workers from the point of recruitment to the point of hire.

(3) Defendant shall not offset the value of the benefits provided by it pursuant to its contract with its employees in the form of housing, utilities and meals against the minimum wage required to be paid to its employees if such offset would result in the employee receiving in cash less than the minimum wage prescribed by the Act; and it is further

ORDERED, ADJUDGED AND DECREED that a hearing shall be scheduled on the issue of the extent of damages and the entitlement of specific employees thereto.

/s/
United States District Judge

DATED: December 4, 1979
Camden, New Jersey

Entry of this Order is
approved as to form:

(Attorney for Defendant)

/s/ Frederick A. Jacob
FREDERICK A. JACOB

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed February 13, 1980)

This matter having been brought before the Court by Frederick A. Jacob, Esquire, attorney for Defendant, on a Motion to reconsider a decision returned on October 19, 1979 that granted partial summary judgment in favor of the Plaintiff, and the Court having considered the Briefs of counsel, the Affidavits, and good cause having been shown.

It is on this 13 day of February, 1980, ORDERED and ADJUDGED that Defendant's application is denied.

/s/ John F. Gerry,
JOHN F. GERRY,
United States District Judge

No. 80-1114

FILED
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

GLASSBORO SERVICE ASSOCIATION, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner may count the cost of transporting farm workers from Puerto Rico to the mainland toward the minimum wage due its workers under the Fair Labor Standards Act of 1938.

2. Whether an agreement between the Secretary of Labor of Puerto Rico, acting on behalf of Puerto Rican employees, and petitioner is a "bona fide collective-bargaining agreement" within Section 3(m) of the Fair Labor Standards Act of 1938, which does not permit an employer's payments for board, lodging, and facilities excluded from wages by a collective bargaining agreement to be counted toward the minimum wage due its employees.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is unreported. The initial opinion of the district court (A. 108-119)[1] is not officially reported; it is unofficially reported at 87 Lab. Cas. (CCH) para. 38,865. The opinion of the district court denying the motion for reconsideration (A. 122-124) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1980. The petition for a writ of certiorari was filed on January 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "A." refers to the joint appendix filed in the court of appeals.

STATEMENT

The Secretary of Labor brought this action against petitioner in the United States District Court for the District of New Jersey under Sections 11 and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 211 and 217. The Secretary sought an injunction and damages, alleging that petitioner had violated the minimum wage provisions of the Act (A. 108-109).[2] Petitioner is a New Jersey corporation, consisting of 299 member farms. Its purpose is to arrange for the hiring of farm workers to harvest crops for its members (A. 109). Petitioner recruits most of the workers in Puerto Rico and assigns them to farms when they arrive in New Jersey (*ibid.*). The law of Puerto Rico provides that prospective employers may not recruit Puerto Rican workers for work outside the Commonwealth unless the employers have first negotiated a written agreement containing certain guarantees required by the Secretary of Labor of Puerto Rico.[3] P.R. Laws Ann. tit. 29, §§ 526-534 (1966 & Supp. 1979).

Accordingly, in 1976 and 1977, the years covered by the Secretary's complaint, petitioner negotiated agreements with the Secretary of Labor of Puerto Rico (A. 109, 26-29). The agreements are signed by the employer and the Secretary of Labor of Puerto Rico (A. 27, 29). Each worker signs a statement concurring in the terms of these agreements (*ibid.*). The agreements cannot be "modified, amended, or waived in any regard without the express written agreement

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[2]Section 6 of the Act, 29 U.S.C. (& Supp. III) 206, prescribes the minimum wage that must be paid to various classes of employees, including those involved in this case. The interpretation of Section 6 is not in dispute here. Section 15(a)(2) of the Act, 29 U.S.C. 215(a)(2), makes it unlawful for any person to violate Section 6.

[3]We will refer to respondent Secretary of Labor of the United States as "respondent" or "the Secretary." We will refer to the Secretary of Labor of Puerto Rico by that full title.

of the Employer, the Worker, and the Secretary [of Labor of Puerto Rico]" (A. 26, 28).

The agreements specify terms and conditions of employment comprehensively and in detail (see A. 26-29). They include the hours of work expected of employees and provision for workers' compensation, group life insurance, and other benefits. Article 3 of each of the agreements sets forth the circumstances under which an employee may be discharged; the employer must give notice of a proposed discharge to the appropriate field office of the Migration Division of the Puerto Rico Department of Labor, and a meeting must be held among the employer, the worker, and a field representative of the Puerto Rico Department of Labor to discuss the discharge (A. 26, 28). A discharged worker may complain to the Secretary of Labor of Puerto Rico through the detailed grievance procedures prescribed in Article 12 of the agreements (A. 27, 29). These procedures apply to any worker complaint concerning the breach, application or interpretation of the terms of the agreements (*ibid.*). Article 12 provides that if the Secretary of Labor of Puerto Rico believes that the employer has breached the agreements, he may sue the employer on behalf of the worker (*ibid.*).

Finally, the agreements require the employer to provide lodging of a specified nature at no cost to the workers, and either meals to be paid for by the worker at a specified daily rate or cooking and eating facilities at no cost to the worker (A. 26, 28). They establish the workers' hourly wages (*ibid.*) and provide for workers' transportation to their place of employment (A. 26-27, 28-29). Specifically, petitioner pays the cost of workers' air fare and transportation from Puerto Rico to the member farms (A. 109). Petitioner then exacts these costs from the workers' wages according to a schedule specified in the agreements (*ibid.*). If and only if the workers complete their terms of employ

ment with petitioner, petitioner will repay their transportation costs and pay for transportation back to Puerto Rico (*ibid.*). It is undisputed that this arrangement causes some workers who do not complete their terms of employment to receive cash wages less than the statutory minimum wage (A. 109-110; Pet. 9).

In his complaint, the Secretary alleged that this pay practice violated the Fair Labor Standards Act of 1938. Petitioner raised two defenses based on Section 3(m) of the Act, 29 U.S.C. 203(m).[4] In relevant part, Section 3(m) defines "wages," for purposes of the minimum wage provisions, to include:

> the reasonable cost, as determined by the [Secretary], to the employer of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee * * *.

Petitioner asserted, first, that Section 3(m) entitles it to credit transportation costs toward its minimum wage obligation. Second, petitioner contended that its agreement with the Secretary of Labor of Puerto Rico is not a "bona fide collective-bargaining agreement" within the meaning of Section 3(m). Therefore, according to petitioner, the food, lodging, and facilities which that agreement requires it to furnish, without cost, to its workers should be counted toward the workers' minimum wage.

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[4]Section 3(m) was amended effective January 1, 1979, and January 1, 1980. Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, Section 3(b), 91 Stat. 1249 (codified at 29 U.S.C. (Supp. III) 203(m)). This amendment is not relevant here.

The district court rejected both of petitioner's contentions, and enjoined petitioner from deducting the transportation costs from its employees' wages to the extent the deductions reduced the wages below the statutory minimum, and from offsetting against the minimum wage the value of housing and other facilities provided under the agreement with the Secretary of Labor of Puerto Rico (Pet. App. 2a-3a).[5] On the first issue—whether the transportation costs could be counted against the workers' wages—the court observed that regulations issued by the Department of Labor provide that where the Administrator of the Wage and Hour Division finds that facilities are furnished "primarily for the benefit or convenience of the employer," the costs of furnishing those facilities may not be counted toward the employer's minimum wage obligation. 29 C.F.R. 531.3(d)(1). In particular, the court noted a Department regulation, 29 C.F.R. 531.32(c), which provides that transportation costs are primarily for the benefit of the employer "where such transportation is an incident of and necessary to the employment" (A. 113-114). The court also cited two opinion letters issued by the Administrator of Wages and Hours (A. 114). One letter, issued in 1970, stated: "We have consistently regarded the cost of transporting employees to and from the point of hire as a cost to be borne by the employer, and not the employees, as a cost incidental to the employer's recruiting program. Such transportation cost would not properly be considered as a part of the individual employee's wages under section 3(m) * * * ." Opinion Letter No. 1139, [1969-1973 Transfer Binder] Wages-Hours Admin. Rul. (CCH) para. 30,709 (Dec. 10, 1970). The other letter, issued in 1969, referred to a position the Administrator had also taken in 1960: "[W]e found that the cost of

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[5]Because there were unresolved issues of fact with respect to the extent of damages, the court denied summary judgment on that issue (A. 119).

transporting certain employees to and from the point of hire was normally borne by the [employer] and not the employees as a cost incidental to the recruitment program of the [employer] and, therefore, would not be properly considered as a part of wages." Opinion Letter No. 937, [1966 1969 Transfer Binder] Wages-Hours Admin. Rul. (CCH) para. 30,949 (Feb. 4, 1969).

On the second issue, the district court held that the agreement between petitioner and the Secretary of Labor of Puerto Rico was "the functional equivalent of a collective bargaining agreement" (A. 123). The court rejected petitioner's contention that the proviso in Section 3(m) applies only to collective bargaining agreements negotiated by a representative certified under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* (A. 122-123). The court noted that Department of Labor regulations, 29 C.F.R. 531.6(c), explicitly permit the Administrator of Wages and Hours to treat other agreements, not negotiated under the auspices of the National Labor Relations Act, as collective bargaining agreements for purposes of the Section 3(m) proviso (A. 122). Therefore, the court held, petitioner cannot credit toward the minimum wage the cost of food, lodging, and facilities that the agreements require it to furnish (A. 117; Pet. App. 3a).

The court of appeals summarily affirmed the judgment of the district court (Pet. App. 1a).

ARGUMENT

1. Petitioner contends (Pet. 13-15) that the district court erred in holding that the Act does not permit petitioner to count toward its minimum wage obligations the costs of transporting employees from Puerto Rico to their places of employment in New Jersey. But the district court's holding is fully consistent with, and indeed is based on, regulations and interpretations of the Act issued by the Secretary and

the Administrator of Wages and Hours. Such administrative constructions, as this Court has recently remarked, are "entitled to deference unless [they] can be said not to be a reasoned and supportable interpretation of the Act." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980). Indeed, in reversing a judgment because the lower court was insufficiently deferential to interpretations of the Fair Labor Standards Act issued by the Administrator, this Court observed that those interpretations are "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case" and are therefore "entitled to respect." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944). The Court continued:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act * * * constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements * * * .

Id. at 140. Judged by these standards, the decision of the courts below is clearly correct.

Since at least 1960, the Administrator has ruled that the cost of transporting employees from the place of hire to the place of work cannot be credited toward the employer's minimum wage obligation. This interpretation was reaffirmed in detail in 1970. See pages 5-6, *supra*. Petitioner has identified no interpretations issued by the Administrator or the Secretary that are inconsistent with this position, and other regulations construing the Act are in fact fully in accord with this interpretation. See, *e.g.*, 29 C.F.R. 778.217(b)(5)(i). Moreover, since 1960, Congress has amended other portions of Section 3(m) of the Act on several

occasions. See, *e.g.*, Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, Section 13(e), 88 Stat. 64; Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Section 101(a), 80 Stat. 830. It has never attempted to modify the Secretary's or the Administrator's interpretations of this aspect of Section 3(m). See *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974).

There can also be no doubt that the Administrator's interpretation is reasonable. It is unclear whether petitioner contests the regulation which provides that transportation costs may not be credited toward the minimum wage "where such transportation is an incident of and necessary to the employment." 29 C.F.R. 531.32(c). This regulation is a straightforward application of the rule, which petitioner does not challenge, that the cost of facilities furnished primarily for the benefit of the employer cannot be credited toward the employer's minimum wage obligation. See 29 C.F.R. 531.3(d)(1); Pet. i, 17. Petitioner's business consists of supplying Puerto Rican farm workers to New Jersey farms (Pet. 7-8). Transporting the workers is plainly necessary to this business; indeed, it is integral to it.[6]

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[6]Petitioner argues that the district court erred in granting summary judgment because it raised a factual issue about whether the transportation costs are incurred for its benefit (Pet. 17-19). This argument fails for two reasons. First, when petitioner opposed the Secretary's summary judgment motion in the district court, it did not submit any of the affidavits on which this argument is based. On review of summary judgment, an appellate court will not consider affidavits that were not submitted of record in the trial court. See C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2716, at 435 (1973). Second, petitioner's argument apparently is that the practice of exacting transportation costs from workers' wages enables it to employ poorer workers, thus benefitting the workers, not itself (Pet. 18). But the issue is whether the *transportation* is primarily for petitioner's benefit, not whether the practice of exacting transportation costs from the employees' wages benefits petitioner or the employee. Petitioner's argument amounts to the assertion that by paying less than the minimum wage, it can employ more workers. This is, of course, not a defense to the claim that it has violated the minimum wage laws.

2. Petitioner also asserts (Pet. 15-17) that the proviso to Section 3(m) of the Act does not apply to food, lodging, and facilities it is required to furnish under its agreement with the Secretary of Labor of Puerto Rico. Petitioner's claim is that the term "bona fide collective-bargaining agreement" in the proviso includes only agreements negotiated by a bargaining agent certified under the NLRA.

Petitioner's view conflicts with the language of Section 3(m), the manifest legislative intent, and the consistent administrative interpretation. Congress is able to refer specifically to collective bargaining agreements negotiated under the auspices of the NLRA when it chooses to do so. See, *e.g.*, 29 U.S.C. 185. Congress' decision to refer simply to "collective-bargaining agreement" without reference to the NLRA must, therefore, have been deliberate.[7] In addition, it is implausible to suggest that Congress intended wholly to deny the benefit of the Section 3(m) proviso to all those classes of employees—including agricultural employees—who are not covered by the NLRA. See 29 U.S.C. 152(3). Moreover, as the district court recognized (A. 122) and petitioner concedes (Pet. 13-17), petitioner's position cannot be reconciled with 29 C.F.R. 531.6(c), which authorized the Secretary to treat as collective bargaining agreements some agreements negotiated by representatives other than those certified under the NLRA.

The agreements between petitioner and the Secretary of Labor of Puerto Rico have every essential characteristic of

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[7]Petitioner emphasizes the term "bona fide" in Section 3(m) (Pet. 13-17). But petitioner provides no reason for believing that Congress intended "bona fide" to denote only agreements negotiated according to the NLRA. Petitioner does not suggest that the agreements in issue here are somehow fraudulent, and the district court explicitly found that they are not (A. 123-124).

a collective bargaining agreement. As petitioner acknowledges, the Secretary of Labor of Puerto Rico enters into them on behalf of the employees (Pet. i). See *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 334-335 (1944). The Secretary of Labor of Puerto Rico, not the individual workers, negotiates with the employer. See, *e.g.*, *Asociacion de Trabajadores Agricolas* v. *Green Giant Co.*, 518 F. 2d 130, 133 (3d Cir. 1975); *27 Puerto Rican Migrant Farm Workers* v. *Shade Tobacco Growers Agricultural Association*, 352 F. Supp. 986, 988-989 & n.2 (D. Conn.), aff'd, 486 F. 2d 1052 (2d Cir. 1973). The agreements comprehensively set the terms and conditions of employment and provide a grievance procedure. See page 3, *supra*. The Secretary of Labor of Puerto Rico, like a "labor organization representing employees" covered by the NLRA (29 U.S.C. 185), may sue on behalf of employees for a breach of the agreements. Like a collective bargaining agreement under the NLRA, the agreements between petitioner and the Secretary of Labor of Puerto Rico are "the product of a bilateral relationship which is in large measure compelled by law." R. Gorman, *Labor Law* 540 (1976). For these reasons, the courts below correctly held that these agreements are "bona fide collective-bargaining agreement[s]" within the proviso to Section 3(m). It follows that petitioner may not credit toward its minimum wage obligation the cost of food, lodging, and facilities which these agreements require it to furnish in addition to wages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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